IN THE

Supreme Court of the United States

October Term, 1955

No. 503

CECIL REGINALD JAY,

Petitioner,

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization Service

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMERICAN JEWISH CONGRESS AS *AMICUS CURIAE*

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Statement of Interest

This brief *amicus curiae* is submitted with the consent of the parties.

The American Jewish Congress, a national organization established in 1918, is committed to the dual, and for us, inseparable purposes of promoting the creative survival of the Jewish people and of securing and extending American democracy. The special concern of the Jewish people in human rights derives from an immemorial tradition that proclaims, under the highest sanctions of faith and human aspiration, the common and inalienable rights

of all men. The American Jewish Congress has therefore always been unequivocally opposed to communism, fascism and all other forms of totalitarianism. Together with all Americans who prize the blessings of freedom we have repeatedly affirmed our readiness to make those personal and collective sacrifices reasonably calculated to safeguard our democracy. But we have likewise insisted that our nation's security is not enhanced when we resort to measures that violate the essential liberties whose preservation is our basic purpose.

We submit this brief *amicus* because we are convinced that hearing procedures allowing quasi-judicial officers to make determinations affecting the liberty of residents of the United States on the basis of secret dossiers subvert the fundamental procedural protections of our heritage of freedom.

Statement of Case

Petitioner is a 65 year old native of England who has resided in the United States since 1921 (R. 47) without acquiring United States citizenship (R. 16). His deportation was ordered in 1952 (R. 12) because he was a member of the Communist Party of the United States between 1935 and 1940 (R. 47). Petitioner thereupon on November 25, 1953 applied to the Immigration and Naturalization Service (hereinafter called the Service) for the discretionary relief of suspension of deportation, authorized by statute (R. 13). In accordance with regulations promulgated by the Attorney General, a hearing was held before a Special Inquiry Officer to determine whether (a) the petitioner met the statutory requirements for suspension of deportation and (b) whether the Special Inquiry Officer

should grant petitioner's application.[1] The Special Inquiry Officer, who had previously ordered petitioner's deportation (R. 29), found that the alien had not been a member of the Communist Party since 1940 (R. 47), had been a person of good moral character for the last ten years prior to his application for suspension and that his deportation would result in "extreme and unusual hardship" (R. 48). The Special Inquiry Officer concluded: "On the record, respondent appears to be qualified for suspension of deportation" (R. 48). He held, however, that on the basis of "confidential information relating to the respondent," the source, nature or details of which were not disclosed to the petitioner, suspension of deportation should not be granted (R. 48).[2] No reason was given for the denial of the application nor is there anything in the record to justify the denial.

On appeal, the Board of Immigration Appeals (hereinafter called the Board), after considering "the evidence

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[1] The only witnesses at this hearing were those called by the alien. Counsel for the alien and the Service stipulated that a Service report "relative to the respondent's residence and character" might be introduced in the record after the hearing closed on the understanding that the alien would be given an opportunity to "refute" anything "derogatory" contained in the report (R. 42). The record does not contain this report.

[2] The petitioner has alleged that the so-called confidential information is merely the fact that the "American Committee for the Protection of the Foreign Born", listed as "subversive" on the Attorney General's proscribed list of organizations, has solicited support for the petitioner (as well as for others facing deportation) (R. 7). The Service has denied that the confidential information "was of the character or substance" alleged by the petitioner (R. 14) but otherwise has failed to give any inkling of the general nature of the derogatory material or of its source or contents. Thus the alien, as well as the Court, does not even know whether the disqualifying material relates to political conduct, financial matters, or even irrational prejudice. The information may perhaps be rebutted, if disclosed, but the alien cannot refute what is not disclosed to him.

of record" and "in light of the confidential information available," affirmed the decision of the Special Inquiry Officer (R. 51). No further appeals or administrative remedies were available to the alien within the Service or the Department of Justice.[3]

Petitioner then applied for a writ of habeas corpus challenging the use of confidential information not of record to deny him the statutory privilege he was otherwise qualified for (R. 7-9). The writ was denied (R. 19). On appeal, the Court of Appeals affirmed the denial of the writ, specifically upholding the use of non-record confidential information (R. 26). This Court granted certiorari (R. 28).

The Questions to Which This Brief Is Addressed

This brief is addressed to two questions:

1. Whether the Attorney General, having by regulation established hearing procedures authorizing a Special Inquiry Officer of the Service to determine whether a deportable alien should receive the discretionary relief of suspension of deportation, may vitiate such hearing by allowing such officer to deny such relief to an alien, otherwise qualified for it, solely and exclusively on the basis of "confidential information," not of record, the source, nature and details of which are not disclosed to the alien.

2. Whether a decision of a Special Inquiry Officer denying an application for suspension of deportation should be set aside and a new determination required where the decision, in violation of a regulation promulgated by the Attorney General having the force of law, does not contain a statement of "the reasons for granting or denying such application."

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[3] 8 C.F.R. Sec. 6(1)(d)(2).

Summary of Argument

I. The Attorney General has delegated his power to suspend deportation to Special Inquiry Officers and given them virtually unlimited power to base their decisions on evidence that they decide to withhold from the alien. The regulation that permits the Special Inquiry Officers to consider such non-record information in the thousands of suspension of deportation hearings they hold each year is not authorized by the Immigration and Nationality Act and is therefore invalid. The Attorney General may not both direct that the exercise of discretion be based on a "hearing" and permit the hearing officer to use a form of adjudication that denies the essentials of a fair hearing. Congress carefully provided for and limited the use of non-record information in cases involving exclusion of immigrant aliens; its failure to direct such use in suspension of deportation cases involving domiciled aliens renders the regulation invalid.

II. Assuming nevertheless that the Attorney General may direct special inquiry officers to hold "hearings" on the issue of suspension of deportation and simultaneously vitiate that hearing by permitting them to use non-record information in deciding that issue, the Courts should resolve this inconsistency. This can and should be accomplished by requiring the Service to furnish the alien with a "fair resume" of such information, as has been done, in similar circumstances, under the Universal Military Training and Service Act. Such a requirement would reconcile, as nearly as possible, the otherwise inconsistent rules requiring a fair hearing but denying an essential requirement of a fair hearing.

III. The regulations promulgated by the Attorney General, which have the effect of law, require the Special Inquiry Officers who conduct hearings on suspension of deportation to render written decisions containing a discussion of the evidence and the reasons for granting or denying the relief sought. The decision of the Special Inquiry Officer in the case at bar failed to comply with that requirement and hence, independently of the arguments set forth above, the decision denying petitioner suspension of deportation must be set aside with directions that his application be redetermined.

I

The Attorney General has not been authorized by Congress to promulgate a regulation allowing applications for suspension of deportation to be denied upon the basis of non-record "confidential information" not disclosed to the applicant.

A. The role of the Special Inquiry Officer in the suspension of deportation

The courts that have had occasion to consider the question of the use of confidential information in passing upon applications for suspension of deportation have generally considered this problem in the abstract without the benefit of a description of how the system works in practice.[4] We believe that we can be of greatest help to the Court by submitting such a description to it.[5]

[4] See *Jay v. Boyd*, 222 F. 2d 820 (9th Cir. 1955), rehearing denied, 224 F. 2d 957 (1955); *United States ex rel Matranga v. Mackey*, 210 F. 2d 160, certiorari denied, 347 U.S. 967 (1954).

[5] For a description of the operation of our entire deportation law, see Maslow, *Recasting Our Deportation Law: Proposals for Reform*, 56 Columbia Law Rev. 309-366 (March 1956).

The Service has in the last four fiscal years ending June 30, 1954 deported an average of 20,000 aliens a year.[6] An even larger number of deportation hearings are held annually, a total of 37,249 being held in the last fiscal year.[7] In four-fifths of these hearings, deportability is not contested so that the main purpose of most of these hearings is to determine whether the deportation order shall be suspended.[8]

Although Congress has authorized the Attorney General to suspend deportation of a deportable alien,[9] he, by regulation, has delegated this power to the Special Inquiry Officers of the Service.[10] The regulations prescribe the manner in which the Special Inquiry Officer shall exercise this power and thus spell out the alien's rights.[11] The

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[6] 1954 Annual Report of the Service, Table 33. This total does not include the hundreds of thousands of Mexican "wetbacks," *i.e.*, illegal entrants, who are expelled each year without formal procedures.

[7] Letter dated Dec. 13, 1955 from E. A. Loughran, Assistant Commissioner of Immigration, to Will Maslow.

[8] Task Force on Legal Services and Procedure, *Report on Legal Services and Procedure* (prepared for the Commission on Organization of the Executive Branch of the Government), p. 272 (1955), hereinafter cited as Hoover Legal Task Force Report.

[9] Immigration and Nationality Act, Sec. 244(a), 8 U.S.C. Sec. 1254(a).

[10] "In determining cases submitted for hearing, special inquiry officers shall exercise the authority contained in section 242(b) of the Immigration and Nationality Act to order deportation, and the authority contained in section 244 of the Immigration and Nationality Act to suspend deportation. * * *" 8 C.F.R. Sec. 242.6. On January 6, 1956, the Service promulgated new regulations revising former parts 242 and 243 of Title 8, 21 Fed. Reg. 97-102 (1956). Since these new regulations do not affect proceedings instituted before that date (8 C.F.R. Sec. 242.23), all references will be to the prior regulations.

[11] The Service is forbidden to violate its own regulations. *United States ex rel. Johnson v. Shaughnessy*, 336 U. S. 806, (1949); *Bridges v. Wixon*, 326 U. S. 135, 153 (1945).

alien is entitled to apply for suspension "at any time during the [deportation] hearing."[12] The burden of establishing that he meets the statutory requirements is upon the petitioner, who may submit any evidence in support of his application that he believes should be considered by the Special Inquiry Officer.[13] The Special Inquiry Officer, when such an application has been made, is required to "present the evidence" as to the "factors bearing upon the respondent's eligibility" for this relief.[14] After the conclusion of the hearing, the Special Inquiry Officer is required to prepare and sign a "written decision" which must contain "a discussion of the evidence relating to the alien's eligibilty for such relief and the reasons for granting or denying such application."[15] Finally, the decision must be concluded with an "order" which shall recite that the alien shall be deported or that his deportation shall be suspended.[16] The order of the Special Inquiry Officer is final,[17] except that the alien (or the Service) may appeal a decision of a Special Inquiry Officer denying suspension to the Board.[18] From its decision, the alien has no further appeal.[19]

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[12] 8 C.F.R. Sec. 242.54 (d).

[13] *Ibid.*

[14] 8 C.F.R. Sec. 242.53 (c).

[15] 8 C.F.R. Sec. 242.61 (a). In the instant case, the Special Inquiry Officer failed to list, let alone discuss, the "reasons" for denying the alien's application (R. 48). This point is discussed in Point III, pp. *27* to *29*, *infra*.

[16] 8 C.F.R. Sec. 242.61 (c).

[17] 8 C.F.R. Sec. 242.61 (c).

[18] 8 C.F.R. Sec. 6.1 (b) (2).

[19] The Attorney General, however, may review any decision of the Board on his own motion, at the request of the Assistant Commissioner, Inspections and Examinations Division, or at the request of the Chairman or a majority of the Board. 8 C.F.R. Sec. 6.1 (h) (1).

In practice the Attorney General rarely reviews a decision of the Board, reviewing an average of only a dozen a year.[20] The Board itself closed 6,898 deportation cases in fiscal year 1954,[21] so that the Special Inquiry Officer was the final authority in the other 30,000 cases heard during that year, in most of which the question of suspension of deportation was the crucial issue. During the five fiscal years ending June 30, 1954, the Service ordered suspension in 23,329 cases or an average of 4,665 a year.[22]

To state therefore in speaking of the power to suspend that "Congress chose to rely upon the informed judgment of a cabinet officer with recognized facilities for investigation . . ."[23] is merely to look at the statute and to forget about the underlying regulations, which also have the force and effect of law.[24] Suspension, like deportation itself, operates on an assembly-line basis, administered by the entire Service and is not dependent on "the informed judgment" of a cabinet officer.

These Special Inquiry Officers, who are the final authority in such deportation cases, constitute a group of about 90[25] relatively minor officials of the Service.[26] They

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[20] Testimony of Thomas G. Finucane, Chairman of the Board, Hearings before the House Appropriations Committee on the Department of Justice Appropriation for 1956, 84th Cong., 1st Sess., p. 37 (1955).

[21] *Hearings, supra* note 20, at p. 35.

[22] 1953 Annual Report of the Service, p. 35; 1954 Annual Report, p. 26.

[23] Brief for the Government in Opposition to Petition for Certiorari, p. 9.

[24] *United States ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260, 265 (1954); *United States ex rel. Johnson* v. *Shaughnessy*, 336 U. S. 806 (1949); *Bridges* v. *Wixon*, 326 U. S. 135, (1945).

[25] Hoover Legal Task Force Report, p. 273.

[26] They are paid $7,570 a year. *"Practices and Procedures of the Immigration and Naturalization Service in Deportation Proceedings."* Hearings Before the Subcommittee on Legal and Monetary Affairs, House Committee on Government Operations, 84th Cong., 1st Sess., p. 167 (1955).

do not enjoy the independent status of trial examiners under the Administrative Procedure Act;[27] are appointed by[28] and hold their office at the pleasure of the Commissioner of Immigration and are subject to his discipline.[29] Several governmental studies have alluded to the lack of educational qualifications of these Special Inquiry Officers. A Hoover Commission Task Force reported that only 24 of the 90 had "some legal education," of whom only 19 were attorneys.[30] The President's Commission on Immigration and Naturalization, reporting in 1952 on the qualifications of the Service's hearing officers (most of whom were later designated Special Inquiry Officers), stated that 60% of the 119 officers had neither a college degree nor legal training.[31]

These Special Inquiry Officers operate under the pressure of an almost incredible workload. Assuming 225 working days a year, in fiscal year 1954 they conducted an average of 1.8 deportation hearings and .7 exclusion hearings each working day.[32]

What this Court must pass on therefore is not "the informed judgment of a cabinet officer" exercising "the

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[27] *Marcello* v. *Bonds*, 349 U. S. 302 (1955).

[28] 8 C.F.R. Sec. 9.1(b).

[29] The Service announced publicly that it had reprimanded a Special Inquiry Officer and had suspended him for 20 days without pay because he had failed to consider in a suspension case all the derogatory information concerning the alien in the files. H.R. Rep. No. 1458, 84th Cong., 1st Sess., p. 7-9 (1955). The incident is referred to in *Marcello* v. *Bonds*, 349 U. S. 302, 318-319 (1955).

[30] Hoover Legal Task Force Report, p. 273.

[31] *Whom We Shall Welcome*, Report of the President's Commission on Immigration and Naturalization, p. 163 (1953).

[32] In addition to 37,249 deportation hearings, the Special Inquiry Officers conducted 13,254 exclusion hearings during the fiscal year 1954. Hoover Legal Task Force Report, p. 272.

power of executive clemency" but the disposition of suspension applications by minor officials of the Service whose qualifications, workload and general lack of independence are not such as to command respect or inspire confidence.

B. The operating definition of "confidential information"

Regulation 244.3 of Title 8 of the Code of Federal Regulations provides:

> "In the case of an alien qualified for voluntary departure or suspension of deportation under Section 242 or 244 of the Immigration and Nationality Act the determination as to whether the application for voluntary departure or suspension of deportation shall be granted or denied (whether such determination is made initially or on appeal) may be predicated upon confidential information without the disclosure thereof to the applicant, if in the opinion of the officer or the Board making such determination the disclosure of such information would be prejudicial to the public interest, safety, or security."

Armed with such a boundless grant of authority, it would be surprising if Special Inquiry Officers of the type described were fastidious about the type of material they are permitted by Regulation 244.3 to label "confidential." Confirmation of these fears is afforded by the testimony taken recently by the House Committee on Government Operations in its intensive investigation of the *Brancato* suspension case, an apparently typical proceeding.

The House Committee revealed that there are two types of "confidential information": that which is "classified defense information" and that which the Special Inquiry

Officer himself labels as "confidential."[33] Revealing are the sworn descriptions by various Service officials on varying levels of authority of what is considered "confidential information." A Service investigator, one of whose functions is to assist the Special Inquiry Officer in preparing a case for hearing, described such confidential material as "merely information we received off the street."[34] A Special Inquiry Officer described it as "what might be termed as hearsay evidence, which could not be gotten in the record. . . ."[35] A district chief of the Service described it as "information from persons who were in a position to give us information that might be detrimental to the interests of the Service to disclose that person's name. . . ."[36] The head of the Investigating Division of the Service described it as "such things, perhaps, as income tax reports, or maybe a witness who didn't want to be disclosed, or where it might endanger their life, or something of that kind. . . ."[37]

Though these responses vary in sophistication, it is apparent that "confidential information" is information that cannot conveniently or properly be placed in evidence and that Service officials from the investigator at the bottom of the Service ladder to the chief of the Investigating Division near its top so regard it. The Service itself must consider the clause in Regulation 244.3 allowing nondisclosure only when disclosure is "prejudicial to the public interest, safety, or security" as mere window-dressing. Its Investigator's Manual (a confidential document de-

[33] *Hearings, supra* note 26, at pp. 138, 207 (testimony of a former district chief of the Examinations Division and of the Assistant Commissioner, Investigations Division, of the Service). See also the reference to the Investigators' Handbook of the Service, which refers to "non-record" information that is not classified. *Id.* at p. 207.

[34] *Id.* at p. 18.

[35] *Id.* at p. 67.

[36] *Id.* at p. 138.

[37] *Id.* at p. 207.

scribed by the House Committee on Government Operations) does not limit confidential information to that described in Regulation 244.3. The Manual instructs its investigators that:

> ". . . in certain types of cases requiring reports of character investigation, a report containing unfavorable information cannot be placed in evidence if such information is based on confidential records *or if adverse witnesses are unwilling to testify*. This applies for example to hearings involving suspension of deportation." (Emphasis added.)[38]

In such cases, the Manual continues, two reports shall be prepared: one containing all the information, favorable and unfavorable; the second, only the favorable. The shorter report is to be forwarded to the officer who requested the investigation to be placed in the hearing record. "*The full report, though not made a part of the hearing record, will be considered in making a decision in the case.*" (Emphasis added.)[39]

The House Committee on Government Operations undertook its investigation of the *Brancato* case not from any sympathy for aliens facing deportation but to determine why suspension of deportation had been granted to what it believed was a notorious racketeer. After a searching examination of the procedures of the Service in this case, it concluded, however, that "the use of confidential information as a basis for granting or denying relief is at complete variance with basic common law precepts."[40]

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[38] *H.R.* Rep. No. 1458, 84th Cong. 1st Sess., p. 6 (1955).

[39] *Ibid.*

[40] H.R. Rep. No. 1458, 84th Cong. 1st Sess., p. 14 (1955). Judge Dimock who upheld the use of confidential material in suspension cases acknowledged: "I realize that this means that serious abuses are possible with grave consequences. . . ." *United States ex rel. Mafranga* v. *Mackey*, 115 F. Supp. 45, 49 (1953).

C. *Regulation 244.3 is not authorized by the Immigration and Nationality Act and is therefore invalid.*

The section of the Immigration and Nationality Act authorizing the Attorney General to suspend deportation "in his discretion" contains no reference to a hearing. We may assume therefore for the purposes of this brief that the Attorney General is not required to afford one to an alien seeking the discretionary remedy of suspension. But if the Attorney General on his own initiative prescribes a hearing, can he fix the type of hearing he desires, even one that allows the officers presiding at such hearings to consider non-record information in passing upon applications for discretionary relief?

It must be remembered that the Attorney General is not free to promulgate any regulations that may suit his fancy. Section 103 of the Immigration and Nationality Act authorizes the Attorney General to "establish such regulations . . . and perform such other acts as he deems necessary for carrying out his authority under the provisions of this Act." A regulation that is not only unnecessary to carry out his authority under the Act but is inconsistent with other provisions of the Act is not authorized by it.

The Attorney General has had the power since 1940 to suspend deportation of deportable aliens, except as to those who were in the subversive, criminal, narcotic or immoral classes.[41] Since December 24, 1952, even this limitation has been removed; there are today no deportable offenses that disqualify an alien from discretionary relief.[42]

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[41] Smith Act, c. 939, Sec. 20, 54 Stat. 673 (1940), 8 U.S.C. Sec. 452 (1946).

[42] Immigration and Nationality Act, Sec. 244(a)(1-5), 8 U.S.C. Sec. 1254(a)(1-5).

For twelve years, this power to suspend deportation was exercised without a regulation allowing recourse to non-record information.[43] It cannot be said therefore that it is necessary to use confidential information in passing upon applications for suspension. It is true that the Immigration and Nationality Act for the first time allowed the suspension of aliens in the subversive, criminal, narcotic or immoral classes but Congress did not prescribe any different procedure for the disposition of their applications for suspension from those for all other types of deportable aliens. It merely required a longer period of residence and of good moral character and stipulated that it must affirmatively pass on each of the suspensions granted, whereas it allowed suspension in other types of deportable offenses to go into effect if it failed specifically to disapprove such suspensions.[44] Certainly evidence of the undesirability of deportable aliens, even those in the subversive, criminal, narcotic or immoral classes, could be introduced in an administrative type of hearing in which legal rules of evidence are not followed.[45]

In 1949, in *Matter of A.*, 3 I. & N. Dec. 714, A-6178382, the Board had before it a case in which a Presiding Inspector had recommended that suspension of deportation should be denied because the record of the hearing established that the alien had been a secretary of the International Workers Order, an organization on the Attorney General's list of "proscribed" organizations (p. 714). The

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[43] *Matter of A.*, 3 I. & N. Dec. 714 (1949).

[44] Compare Sec. 244(a)(5) with Sec. 244(a)(3) of the Immigration and Nationality Act.

[45] *United States ex rel. Impastato v. O'Rourke*, 211 F. 2d 609 (8th Cir.), certiorari denied, 348 U. S. 827 (1954); *United States ex rel. Tisi v. Tod*, 264 U. S. 131, 133 (1924).

Central Office of the Service adopted the Presiding Inspector's recommendation and denied suspension on the ground that "The evidence in the file (some of it confidential in nature) establishes to our satisfaction that the alien's continued presence in the United States would be prejudicial to the interests of the country" (p. 715).

On appeal, the Board after discussing the applicable regulations stated (p. 716): "They likewise impose a duty to accord a fair hearing to an alien on the issue of discretionary relief" and concluded: "In short we hold that while the grant or denial of suspension of deportation is discretionary, the exercise of that discretion must be based upon the evidence of record" (p. 718).

The case having been certified for review to the Acting Attorney General at the request of the Service, on November 16, 1949, he approved the decision of the Board (p. 718). One month later, the Acting Attorney General withdrew his prior approval and disapproved the decision of the Board. No reason or explanation was furnished (p. 718). On appeal, the United States District Court for the District of Columbia reversed the Attorney General. *Alexiou* v. *McGrath*, 101 F. Supp. 421 (1951). The Court held:

> "Once the Attorney General has established the procedure affording an opportunity for a fair hearing as has been done here, then I do not believe his discretion can be exercised arbitrarily or capriciously in complete disregard of what appears on the record. These proceedings were infected with unfairness by a consideration of matters outside the record."[46]

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[46] *Alexiou* v. *McGrath*, 101 F. Supp. 421, 424. The District Court concluded erroneously that the Service had found the alien ineligi for suspension. *Id.* at p. 425. In fact the Service denied suspension because it believed that the alien's presence in the United States

One year before the *Alexiou* decision, this Court had upheld an immigration regulation issued by the Attorney General that authorized him during a period of war or national emergency to exclude immigrant aliens, on the basis of confidential undisclosed information, from entering this country.[47]

In 1952 when Congress was debating the Immigration and Nationality Act, it was aware of the varying practice in exclusion and suspension proceedings and the differing holdings in the *Knauff* and the *Alexiou* cases. It enacted Sec. 244(a) of the Immigration and Nationality Act, which does not in any way refer to the use of confidential information in suspension cases. Simultaneously, Section 235(c) of that Act was enacted, specifically authorizing the exclusion of aliens on the basis of confidential information that need not be disclosed to the alien.[48] That section provides:

> "If the Attorney General is satisfied that the alien is excludable under any of such paragraphs [Sec. 212 (a)(27)(28) or (29) which relate to subversive activity] on the basis of information of a confidential nature, the disclosure of which the Attorney General,

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would be prejudicial to United States interests, without ruling upon the alien's eligibility, which at that time necessitated only proof of good moral character and "serious economic detriment" to the alien or his immediate family. Act of July 1, 1948, 62 Stat. 1206, 8 U.S.C. Sec. 155 (c). In *Arakas v. Zimmerman*, 200 F. 2d 322, 324 (3d Cir. 1952), the Court stated "We agree entirely with the holding in Alexiou v. McGrath. . . ." The holding in the *Alexiou* case was followed in *Maetzu v. Brownell*, 132 F. Supp. 751 (D.C. D.C. 1955); *Orhovats v. Brownell*, 134 F. Supp. 84 (D.C. D.C. 1955); and *Ex parte Mota Singh Chohan*, 122 F. Supp. 851 (D.C. N.D. Calif. 1954).

[47] *United States ex rel. Knauff v. Shaughnessy*, 338 U. S. 537 (1950). The regulation in question, 8 C.F.R. 175.57(b), had been promulgated on July 21, 1945, 10 Fed. Reg. 8995 (1945) and was authorized by 22 U.S.C. Sec. 223. The substance of this regulation was later incorporated in Sec. 22 of the Subversive Activities Control Act of 1950, Act of Sept. 23, 1950, c. 1024, Sec. 22, 64 Stat. 1006.

[48] 66 Stat. 199-200, 8 U.S.C. Sec. 1225 (c).

in the exercise of his discretion, and after consultation with the appropriate security agencies of the Government, concludes would be prejudicial to the public interest, safety, or security, he may in his discretion order such alien to be excluded and deported without any inquiry or further inquiry by a Special Inquiry Officer."

The different modes of procedure were dictated by the differing powers of Congress when dealing with immigrant aliens and domiciled ones. Congress has almost plenary power to exclude an immigrant alien,[49] whereas its power when dealing with domiciled aliens is far more restricted.[50]

Nevertheless, without specific authorization, the Attorney General on December 19, 1952, shortly before the effective date of the Immigration and Nationality Act, promulgated Regulation Sec. 244.3.

It will be noted that the decision to withhold disclosure of the confidential information is not made by the Attorney General or the Commissioner of Immigration but by a Special Inquiry Officer or the Board. The Regulation does not require the approval of any other official of the Department of Justice to such non-disclosure.

The laxity of the procedure created by Regulation 244.3 may be contrasted with the provisions of Sec. 235(c) of the Immigration and Nationality Act which authorizes the exclusion of *immigrant* aliens on undisclosed "information of a confidential nature" but only when the exclusion is based on subversive activity and only if the Attorney General has been in "consultation with the appropriate

[49] *United States ex rel. Knauff v. Shaughnessy*, 338 U. S. 537, 544 (1950); *Nishimura Ekiu v. United States*, 142 U. S. 651 (1892).

[50] *The Japanese Immigrant Case*, 189 U. S. 86 (1903); *Lloyd Sabaudo Societa Anonyma v. Elting*, 287 U. S. 329 (1932).

security agencies of the Government."[51] Congress when it did authorize the use of confidential information without disclosure to the alien was unwilling to rely upon the judgment of the Attorney General alone but required him to consult with an appropriate security agency.

Regulation 244.3 goes far beyond the grant of authority in Sec. 235(c). There is nothing in the Regulation that confines its use to subversive aliens or aliens in any particular deportable category. There is nothing in the Regulation that limits the type of information that may be withheld. There is no requirement that it be confidential material transmitted to the Service by a security agency of the Government. There is no requirement that it be "classified" material. There is even no requirement that the determination of what is confidential be made by a person skilled in security matters. On the contrary, all that the Special Inquiry Officer needs to do to consider non-record information without disclosing its source, nature or contents is simply to state that he has done so, citing the Regulation. He does not even have to make a finding in the language of the Regulation that the disclosure "would be prejudicial to the public interest, safety, or security."[52]

It is incredible that Congress whose power to exclude an immigrant alien is almost plenary would carefully limit the uses of confidential information in considering the admissibility of aliens believed to be subversive and then in dealing with non-subversive domiciled aliens where its power is far more restricted authorize a relatively minor official of the Service to exercise arbitrary power, hiding behind information which he himself labels "confidential."

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[51] 66 Stat. 199-200 (1952), 8 U.S.C. Sec. 1225 (c).

[52] *Jay* v. *Boyd*, 224 F. 2d 957 (1955).

When Congress authorized the Attorney General (or the Special Inquiry Officer to whom he has delegated his statutory power), in his discretion, to determine whether suspension of deportation should be allowed, it did not intend that this discretionary power be completely unfettered. It intended that the discretion in fact be exercised [53] and not be exercised arbitrarily or capriciously.[54] Nor may the denial of suspension be "actuated by considerations that Congress could not have intended to make relevant." [55]

But to allow the Service to deny suspension on the basis of non-record information is to allow it to exercise its discretion arbitrarily and capriciously. Indeed to allow it such arbitrary power means that no court will be able to confine its exercise to considerations that Congress would deem relevant, because no court will be able to determine why suspension is denied.[56] Instead of a discretionary power, it becomes a despotic power, because the Attorney General had made judicial review of his action impossible by authorizing the use of undisclosed non-record material, arbitrarily labelled confidential. Congress did not intend that the power to deny suspension of deportation should not be subject to judicial review.

Regulation 244.3 which permits this arbitrary power is not necessary to carry out the Attorney General's discre-

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[53] *United States ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260 (1954).

[54] *United States ex rel. Eyangoulis* v. *Shaughnessy*, 210 F. 2d 572, 574 (2d Cir. 1954); *United States ex rel. Kaloudis* v. *Shaughnessy*, 180 F. 2d 489, 491 (2d Cir. 1950); *United States ex rel. Adel* v. *Shaughnessy*, 183 F. 2d 371 (2d Cir. 1950).

[55] *United States ex rel. Kaloudis* v. *Shaughnessy*, 180 F. 2d 489 (2 Cir. 1950).

[56] *See Boudin* v. *Dulles*, 136 F. Supp. 218 (D.C. D.C. 1955).

tion under the Immigration and Nationality Act, is inconsistent with other provisions of that Act and makes judicial review of that power impossible. It is therefore invalid and must be stricken by this Court. The Court should order the proceeding remanded to the Service with a direction that it reconsider the petitioner's application for suspension of deportation on the basis of record evidence alone.

II

The Attorney General having promulgated inconsistent regulations, that both require a fair hearing in passing upon an application for suspension of deportation and allow such hearing to be vitiated by the use of non-record information not disclosed to the applicant, the courts must resolve the inconsistency by requiring that the applicant be furnished a "fair resume" of such non-record information.

This argument is based on the assumption that Regulation 244.3 is held to be valid.

The Immigration and Nationality Act authorizes the Attorney General to suspend the deportation of any deportable alien provided the alien meets certain statutory requirements. The Act is silent as to the manner in which the Attorney General shall determine whether the alien meets such requirements or how he shall exercise the discretion entrusted to him. The Act thus does not require a hearing to determine either eligibility for suspension or whether the discretion shall be exercised in the alien's favor;

The Attorney General, being free to proceed without a hearing, nevertheless prescribed one.[57] He required first that the application should be made during the hearing[58] held for the purpose of determining deportability *and as part of it*.[59] The Special Inquiry Officer is directed to receive the evidence presented by the alien or, upon the

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[57] The Attorney General who is entrusted by the Immigration and Nationality Act with other discretionary powers has not seen fit to prescribe hearing procedures for their exercise. Thus he is authorized by Sec. 243(h), 8 U.S.C. Sec. 1253(h), "to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution. . . ." The Regulations issued by the Attorney General to implement this statutory provision require the applicant to appear before a Special Inquiry Officer "for interrogation under oath." The alien may submit evidence in support of his claim "during the interrogation." The decision on the claim is made by the regional commissioner. No appeal lies from a denial of the claim. 8 C.F.R. Sec. 243.3(b)(2)(3) (1956 Cum. Pocket Supp.).

Similarly the Attorney General has not seen fit to prescribe a hearing to pass upon applications for change of status from that of a non-immigrant visitor to that of a person lawfully admitted for permanent residence, a discretionary power vested in him (Sec. 245(a), 8 U.S.C. Sec. 1255(a)). Instead he has prescribed an "examination" of the alien-applicant, in which the alien may be accompanied and represented by an attorney, witnesses are examined, briefs submitted, a report of findings prepared by the immigration officer together with recommendations, and a decision made by the district director, appealable to the Assistant Commissioner, Inspections and Examinations Division, who has the final authority to grant or deny such application. The term "hearing" is never used in this portion of the regulations (8 C.F.R. Sec. 245.13, 245.17). Like procedures are provided for applications to create a record of lawful admission for permanent residence (which the Attorney-General "in his discretion" may grant), where the regulations provide only an "examination" not a "hearing" (8 C.F.R. Sec. 249.12, 249.14, 249.16).

[58] The regulations explicitly declare that the proceeding before the Special Inquiry Officer "shall be termed a hearing." 8 C.F.R. Sec. 242.5.

[59] 8 C.F.R. Sec. 242.54(d). Applications will not be received after a hearing has been concluded. Matter of M., 5 I. & N. Dec. 472, 473 (1953). The alien ordered deported must first make an application, as in the present case (R. 13), to reopen the hearing.

latter's failure to do so, to present the evidence himself (8 C.F.R. Sec. 242.53(c)) as to the factors bearing upon the alien's eligibility for such relief. The Special Inquiry Officer is specifically enjoined to "conduct a fair and impartial hearing" (8 C.F.R. 242.53). He must "at the commencement of the hearing" advise the alien "that he will have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government. . . ." Following the hearing, the written decision must contain among other things a "discussion" of the "reasons for granting or denying such application."[60] From such a decision, the alien is entitled as a matter of right to a full appeal to an independent Board of Immigration Appeals, whose decision may not be "dictated" by the Attorney General.[61] The Board may review the decision of the Special Inquiry Officer upon the law, the facts or even on the discretionary question whether relief should be granted or denied.[62]

The Service interprets these regulations as authorizing it to compartmentalize the hearing. It concedes that constitutional due process requires a full and fair hearing, in which the decision is based solely on record information, as to the deportation phase of the hearing. But it insists that the statute does not require that the suspension phase shall be fair and that consequently the decision to deny suspension can be based on non-record information in complete disregard of all of the evidence in the record and indeed without any record evidence to justify it.

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[60] 8 C.F.R. Sec. 242.61(a).

[61] *United States ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260, 266 (1954).

[62] 8 C.F.R. Sec. 6.1(d).

Can the Attorney General thus make a fraud and sham of the hearing he himself has prescribed by authorizing the consideration of so-called non-record secret information? Can he on the one hand maintain that aliens will be given a hearing on their application for discretionary relief and on the other vitiate the very essence of such a hearing? Can he conduct a hearing like a "game of blindman's buff?"[63]

In United States ex rel. Accardi v. *Shaughnessy*, 206 F. 2d 897 (2d Cir. 1953), the court stated in considering an appeal from a denial of an application for suspension of deportation (at p. 901):

> "We may assume, *arguendo*, as we did in United States *ex rel.* Weddeke v. Watkins, 166 F. 2d 369, 371, certiorari denied, 333 U. S. 876, 68 S. Ct. 904, L. Ed. 1152, that since the Attorney General has provided by regulations the procedure by which a deportable alien is accorded a hearing on his application to suspend deportation, that he is entitled to procedural due process in the conduct of such hearing; that is, the requirement of a fair hearing must be met."[64]

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[63] *Simmons* v. *United States*, 348 U. S. 397, 405 (1955).

[64] Other courts have likewise assumed or held that a hearing prescribed by regulation involving an application for discretionary relief must be fair. *United States ex rel. Salvetti* v. *Kramer*, 103 Fed. 777, 779 (2d Cir. 1939) (dictum); *United States ex rel. Bauer* v. *Shaughnessy*, 115 F. Supp. 780, 783 (S.D. N.Y. 1953); *United States ex rel. Giglione* v. *Miller*, 80 F. Supp. 655 (S.D. N.Y. 1949). In the last case Judge Rifkind stated: "* * * it is now accepted that procedural due process must be observed in a hearing even though the alien is invoking relief which is in any event afforded only at official discretion." (at p. 657).

The Court of Appeals, nevertheless, rejected the contention that the hearing had not been fair. This Court granted certiorari and then held that the Board must "exercise its own independent discretion, *after a fair hearing, which is nothing more than what the regulations accord petitioner as a right.*"[65] (Emphasis added)

What distinguishes the determination whether suspension of deportation shall be granted from other situations involving matters of grace or exercise of executive clemency is the limitation imposed by the Attorney General that such determination shall be made after a hearing. A judge may impose a criminal sentence upon the basis of an ex parte probation report not disclosed to the defendant, because there is no rule of law requiring a hearing and the taking of evidence before such sentence is imposed.[66] The Attorney General may reject an alien's claim that he will be subject to physical persecution if deported to a particular country because neither statute nor regulation requires a hearing on such claims.[67]

There is one way at least in which the consistency between a requirement for a fair hearing and the authorization to use undisclosed non-record information in that hearing can be resolved (assuming that the latter regulation is valid). Such a course was devised by this Court in construing the Universal Military Training and Service Act.[68]

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[65] *United States ex rel. Accardi v. Shaughnessy*, 347 U. S. 260, 268 (1954).

[66] *Williams v. New York*, 337 U. S. 241 (1949).

[67] *United States ex rel. Dolenz v. Shaughnessy*, 206 F. 2d 392 (2d Cir.), certiorari denied, 345 U. S. 928 (1953); 8 C.F.R. Sec. 243(b). (1956 Pocket Supp.).

[68] Act of June 24, 1948, c. 652, 62 Stat. 604, 50 U.S.C. App. Sec. 451 *et seq.*

Under Section 6(j) of that Act,[69] a draft registrant who claims exemption from military service because of conscientious objections based on religious beliefs is entitled to appeal to an appeals board from a denial of his claim by the local draft board. The appeals board is required to refer such claim to the Department of Justice for "inquiry and hearing." This Court upheld the right of the appeals board to consider a confidential FBI report on the registrant's activities submitted to it ex parte by the Department of Justice but nevertheless required the appeals board to furnish the registrant a "fair resume" of the FBI report.[70] The nature of this "fair resume" was spelled out in the later case of *Simmons* v. *United States*, where the Court held that a "fair resume" is "one which will permit the registrant to defend against the adverse evidence—to explain it, rebut it, or otherwise detract from its damaging force."[71]

This Court should at least enforce a similar requirement in these suspension cases. It should require a fair resume of the confidential material to be furnished the alien so that he can defend himself against the derogatory material. Particularly where the confidential information is not a "classified" document, the resume should be detailed and should reveal the source and nature of the accusation. Even where the information comes from a security agency of the government, it should be sufficiently detailed and precise

[69] 62 Stat. 612, 50 U.S.C. App. Sec. 456(j).

[70] *United States* v. *Nugent*, 346 U. S. 1 (1953). In *Gonzales* v. *United States*, 348 U. S. 407, this Court held that the registrant was also entitled to a copy of the report and recommendations submitted by the Department of Justice to such appeals board.

[71] *Simmons* v. *United States*, 348 U. S. 397, 405 (1955). In that case, the summary furnished was deemed inadequate and the hearing therefore held to be "lacking in basic fairness." *Id.* at 405.

so that the alien can, if he is able, "rebut it, or otherwise detract from its damaging force." Such disclosure will rehabilitate the hearing required by the Attorney General, provide a minimum of fairness to the applicant and interfere in the least possible degree with the operations of any genuinely confidential intelligence function of the Government.

III

An alien is entitled to a statement of the reasons for the denial of his application for suspension of deportation.

Whether or not Regulation 244.3 is valid and whether or not this Court compels a fair resume of the confidential information relied upon by the Service to be furnished the alien, this Court should require a redetermination of the alien's application.

The regulations promulgated by the Attorney General, which may not be violated by the Service, require a hearing on an alien's application for suspension of deportation. The regulations likewise require the Special Inquiry Officer who presides at such hearing to render a written decision and stipulate that "the decision shall also contain a discussion of the evidence relating to the alien's eligibility for such relief and the reasons for granting or denying such application."[32]

Presumably, the purpose of this requirement is to ensure that the decision of the Special Inquiry Officer shall be a reasoned one, not based on prejudice or caprice. This

[32] 8 C.F.R. Sec. 242.61(a).

requirement also enables the Board, entrusted with appellate or supervisory jurisdiction over the decisions of the Special Inquiry Officer, to weigh the reasons for his action against the evidence in the record or, if Regulation 244.3 is valid, against the contents of whatever confidential material is considered either by the Special Inquiry Officer or the Board. Similarly, the existence of a reasoned opinion enables the Attorney General to assess the wisdom of the actions of his subordinates and when he is so minded to reverse their decisions.

Regulation 244.3 furnishes no excuse for failing to comply with the requirement of Regulation 242.53(c). Even when the Special Inquiry Officer has considered confidential non-record material, he is still able to list the reasons for denying suspension. He may, for example, declare that the confidential information indicates that the alien is engaged in unlawful subversive activity or is a member of a proscribed organization. He may declare that, despite the alien's lack of a criminal record, he is apparently engaged in illegal or immoral enterprises. In short without disclosing the confidential information, he can discuss the nature of the derogatory accusations and then recite how and why such information has affected his judgment.

But the Special Inquiry Officer in the instant case, in violation of Regulation 242.53(c), has failed to give the slightest inkling or indication of a reason for his action. He has merely held that suspension should be denied because of so-called "confidential information, relating to the respondent." That is not a "reason." It is a bald conclusion in support of the decision but without explaining it.

This deliberate flouting of Regulation 242.53(c) is not a technical or trivial violation. It undermines the entire hearing machinery prescribed by the Attorney General. It is a prejudicial error that taints the entire proceeding with arbitrariness and unfairness.

This violation of a Regulation having the force and effect of law and which is binding upon the Service requires this Court to stay the order of deportation issued against the alien and to command a redetermination by the Special Inquiry Officer of the petitioner's application for suspension, a redetermination that must conclude with an opinion stating the reasons for denying such application in sufficient detail and precision so that the alien can, on appeal or otherwise attempt to rebut them.

Conclusion

On any of three different grounds, this Court should reverse the decision of the court below and order a redetermination of the alien's application for suspension of deportation. First, the application has been denied, arbitrarily and capriciously, on the basis of non-record information not disclosed to the alien, the use of which is not authorized by the Immigration and Nationality Act. Second, even if the use of confidential information is valid, the alien was improperly denied a "fair resume" of such information, and thus deprived of the fair hearing required by law. Third, the denial of suspension was invalid in any event because the Service violated its own regulations in not disclosing in its decision the reasons for denying suspension.

The auxiliary directions that should accompany the reversal will vary according to the ground upon which it is based. If Regulation 244.3 is held invalid, then further consideration of non-record confidential information should be precluded. If Regulation 244.3 is upheld, then a "fair resume" of the confidential information should be furnished to the alien. And even if Regulation 244.3 is held valid, the Service should be commanded to obey its own regulations requiring the alien to be furnished with a signed written opinion discussing or at least stating the reasons for the denial of his application. Viewed from any of these three aspects, the denial by the Service of the petitioner's application for suspension of deportation should be set aside.

Respectfully submitted,

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